IN THE

SUPREME COURT
OF THE
UNITED STATES.

October Term, 1936

No. 562

United States of America,
Petitioner,

vs.

Harry J. Madigan,
Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF OF HARRY J. MADIGAN.

DAVID SPAULDING,
P. O. Box 1, West Los Angeles, Calif.,
Attorney for Respondent, Harry J. Madigan.

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OPINIÓN BELOW.

The District Court for the Southern District of California rendered no opinion. The opinion of the Circuit Court of Appeals [R. 17-21] is reported in 85 F. (2d) 609.

QUESTION PRESENTED.

Whether a veteran, totally and permanently disabled, who prior to his total permanent disability, has had two contracts of insurance with the United States ((1) a term contract; (2) a policy of United States life insurance)

and who upon becoming totally and permanently disabled had due and uncollected compensation, which compensation was due and uncollected on the date he ceased to pay premiums on each contract of insurance, may elect to make claim and bring suit on the prior contract, and if found entitled to benefits thereunder, upon surrender of the subsequent contract, receive payments under the prior contract.

STATUTES INVOLVED.

Section 305 of the World War Veterans' Act, 1924, as amended July 2, 1926, 44 Stat. 799, 800 (U. S. C., Title 38, Sec. 516), provides, so far as pertinent, as follows:

> "Where any person has, heretofore, allowed his insurance to lapse, or has canceled or reduced all or any part of such insurance, while suffering from a compensable disability for which compensation was not collected and dies or has died, or becomes or has become permanently and totally disabled, and at the time of such death or permanent total disability was or is entitled to compensation remaining uncollected, then and in that event so much of his insurance as said uncollected compensation, computed in all cases at the rate provided by Section 302 of the War Risk Insurance Act as amended December 24, 1919, chapter 16, Forty-first Statutes, page 371, would purchase if applied as premiums when due, shall not be considered as lapsed, canceled, or reduced; and the Veterans' Administration is hereby authorized and directed to pay to said soldier, or his beneficiaries, as the case may be, the amount of said insurance less the unpaid premiums and interest thereon at 5 per centum per annum compounded annually in installments as provided by law: * * *"

Section 307 of the World War Veterans' Act, as amended by the Act of July 3, 1930, 46 Stat. 1001, 1002 (U. S. C., Title 38, Sec. 518) provides as follows:

> "All contracts or policies of insurance heretofore or hereafter issued, reinstated or converted shall be incontestable from the date of issuance, reinstatement, or conversion, except for fraud, nonpayment of premiums, or on the ground that the applicant was not a member of the military or naval forces of the United States, and subject to the provisions of section 23: Provided, That the insured under such contract or policy may, without prejudicing his rights, elect to make claim to the bureau or to bring suit under section 19 of this Act on any prior contract or policy, and if found entitled thereto, shall, upon surrender of any subsequent contract or policy, be entitled to payments under the prior contract or policy: Provided further, That this section shall be deemed to be effective as of April 6, 1917, and applicable from that date to all contracts or policies of insurance."

STATEMENT.

Harry J. Madigan, respondent, hereinafter called plaintiff, served during the World War in the armed forces of the United States. While so engaged he came into possession of a contract of war risk term insurance which contract insured against death and against total permanent disability. Premiums were paid by plaintiff on this policy of insurance until November 1, 1919. On November 1, 1919 by virtue of subsequent ratings made, plaintiff was determined to be suffering from a compensable disability for which compensation remained uncollected on the date plaintiff became totally and permanent

disabled. [R. 5.] At the time of trial herein, it was agreed [R. 5] plaintiff became totally and permanently disabled on June 6, 1925. That on June 6, 1925 plaintiff had compensation due and uncollected in the amount of $312.25.

On November 1, 1919, plaintiff and defendant entered into a contract of twenty payment life insurance on which premiums were paid for the months of November and December, 1919. By reason of the grace period and these premiums, this policy remained in force through the month of January, 1920. On January 31, 1920, as on November 1, 1919, plaintiff had due compensation which remained uncollected on June 6, 1925.

It is conceded herein (Br. p. 4) that defendant is required under the provisions of Section 305 of the World War Veterans' Act (38 U. S. C. A., Sec. 516) to apply the $312.25 due on the date of permanent total disability, as premiums on insurance so as to carry in force, until the date of total permanent disability, so much insurance as $312.25 would purchase if it had been applied as premiums when due. Petitioner contends the uncollected compensation due on the date of total permanent disability must be applied as premium on the twenty payment life insurance policy. Plaintiff contends he has a right to elect to make claim and bring suit on any prior contract or policy, and if found entitled thereto, upon surrender of the subsequent policy, be entitled to payments under the prior contract.

SUMMARY OF ARGUMENT.

1. Section 305 of the World War Veterans' Act, 1924, as amended, provides that in certain instances money due from the insuror to the insured shall be used to maintain insurance in force which insurance would otherwise be lost.

2. Section 307 of the World War Veterans' Act, as amended by the Act of July 3, 1930, removes the defense of novation or estoppel where an insured has entered into subsequent contracts with the insuror and later seeks to recover on a prior contract. It provides an insured may elect to make claim and bring suit on a prior contract, and if found entitled to benefits under the prior contract, he may recover said benefits.

Section 307 provides all contracts of insurance shall be incontestable from the date of the issuance, reinstatement, or conversion of said contracts.

Section 307 does not limit actions on prior contracts to contracts which have matured prior to a subsequent reinstatement or conversion. An insured is allowed to make claim and litigate the entire prior contract. Rights allowed under Section 305 are rights under a contract.

3. There is no contention by plaintiff that Section 307 contains provisions for reviving insurance. The question is the effect of the provisions in Section 307 which makes each contract incontestable, and which eliminates the defense of novation.

4. If under Section 307 the contracts are incontestable and if there is no novation, it is the contention of the plaintiff that, the two agreements should be treated as separate instruments. That when the subsequent contract

was entered into, the first contract was either automatically canceled or it lapsed. Under Section 307 it could not merge into the new contract. If the original contract lapsed or was canceled, there was on that date, uncollected compensation which compensation remained uncollected on the date of total permanent disability. [R. 5.]

5. It is true the transaction which took place on November 1, 1919 is called a "conversion", but by the provisions of Section 307 as amended July 3, 1930, the act of conversion as used in war risk insurance, is rendered ineffectual. The amendment of July 3, 1930 was specifically made effective as of April 6, 1917.

ARGUMENT.

In *United States v. Arzner* (C. C. A. 9), 57 F. (2d) 488, affirmed 287 U. S. 470, 53 S. Ct. 238, the Circuit Court of Appeals had occasion to consider the legal effect of Section 307 as amended by the Act of July 3, 1930. The Court took into consideration the provisions in the section making all contracts incontestable, and the purpose of the section which was to eliminate the defense of novation, which defense had been sustained in many cases by that Court (*United States v. Buzard*, 33 F. (2d) 883 (C. C. A. 9); *United States v. Kusnierz*, 33 F. (2d) 887 (C. C. A. 9); *United States v. Allen*, 33 F. (2d) 888 (C. C. A. 9).) The Court said:

> "The purpose of this amendment was to meet the situation that had arisen by reason of numerous holdings of the courts to the effect that the subsequent veterans' insurance policies were novations, and that thereafter, recovery could not be had upon the original insurance, and that the ordinary principles of

> contract applied to the veterans' policies * * * By this legislation he was not required to jeopardize his rights under the subsequent contracts or policies in order to present his claim under the superseded war risk insurance * * * He could completely ignore the subsequent policies."

On page 490 of the same case it is said:

> "We think the phrase in the amendment of July 3, 1930 supra 'may without prejudicing his rights elect to make claim to the Bureau or to bring suit under section 445 of this title on any prior contract or policy, and if found entitled thereto' contemplates a suit upon the original policy unembarrassed by any subsequent transactions with the Government' upon 'any subsequent contract or policy * * *'."

Plaintiff here has elected to make claim and bring suit on his original contract. If he is entitled to completely ignore the subsequent contract, all elements necessary to bring Section 305 of the World War Veterans' Act into play are present, for on November 1, 1919 plaintiff was less than totally and permanently disabled. On that date he ceased to pay premiums on his war risk term insurance. On that date he had due and uncollected compensation [R. 5] which compensation remained uncollected on the date of total permanent disability. It has been held repeatedly when such a situation exists, an action for insurance benefits under the contract may be maintained.

In *United States v. Sellers,* 75 F. (2d) 623, 625 (C. C. A. 5), certiorari denied 295 U. S. 763, Section 305 of the World War Veterans' Act was under consideration. The Court said:

> "Though the direction to pay under these circumstances is addressed to the Bureau, we are of the

opinion that in the event of a disagreement, the claim is one under the contract of insurance."

It is true as pointed out by the petitioner, and as stated in the reports of the Committees of the House and Senate, the purpose of Congress in enacting the amendment of July 3, 1930, to Section 307, was to prevent a veteran from being penalized because he attempted to pay premiums and carry his insurance. Here because premiums were paid for the months of November and December, 1919 on a policy too large for plaintiff to carry, it is contended, plaintiff has lost his rights on his prior and cheaper insurance, notwithstanding the intention of Congress that a veteran should not be so penalized.

RETURN OF PREMIUMS.

Section 19 of the World War Veterans' Act as amended July 3, 1930 (38 U. S. C. A., Sec. 445) provides:

> "In the event of disagreement as to claim, including a claim for recovery of premiums, under a contract of insurance * * * an action on the claim may be brought against the United States."

It is admitted herein [R. 5] that a claim was made by plaintiff and denied. While the amount involved as premium payments for the months of November and December, 1919 is not large, it would appear that upon a cancellation and surrender of the subsequent policy, a return of premiums is contemplated by Section 19. Insurance premiums during the months of November and December, 1919 were not earned, for during these months plaintiff, by reason of due and uncollected compensation, was fully covered by Government insurance.

CONCLUSION.

In conclusion it is respectfully submitted that by virtue of Section 307, plaintiff is given the right to elect to make claim and bring suit under any prior contract or policy; that plaintiff ceased to pay premiums on his war risk term insurance at a time he had due and uncollected compensation, and at a time when he was less than totally and permanently disabled. That by virtue of the judgment herein, plaintiff's subsequent policy is canceled and set aside and plaintiff therefore, is entitled to recover on his prior contract. It is therefore respectfully submitted that the judgment of the Court below should be affirmed.

Respectfully submitted,

DAVID SPAULDING,

Attorney for Respondent, Harry J. Madigan.

P. O. Box 1, West Los Angeles, Calif.,